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No. 92-6281

In The

Supreme Court of the United States

October Term, 1993

ROBERT P. HAGEN,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Utah

REPLY BRIEF OF PETITIONER

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I.

ROBERT HAGEN'S COLLATERAL ESTOPPEL, DUE PROCESS AND RIGHT TO COUNSEL CLAIMS SHOULD BE RULED UPON.

Utah has elected not to dispute the soundness of those claims, relying instead on the proposition that those questions are not properly before the Court. Brief of Respondent, p. 45. Below we set forth the reasons why we believe they are.

A. The State of Utah is Playing "Fast and Loose" With the Federal Courts and Should be Judicially Estopped.

In *Ute Indian Tribe v. State of Utah*, 521 F.Supp. 1072 (D. Utah 1981) (hereinafter, "*Ute Tribe District Ct.*") *aff'd* 773 F.2d 1087 (10th Cir. 1985) (*en banc*) (hereinafter, "*Ute Tribe en banc*"), *cert. denied*, 479 U.S. 994 (1986), the Utah federal courts determined that the Uintah Valley Reservation had not been disestablished by Congress when opening the Reservation to nonIndian entry in 1902-1905. On appeal in *Ute Tribe en banc* the State of Utah vigorously defended that federal district court decision:

> [T]he ultimate determination of the [district] court [ ] that . . . the Uintah Reservation was not disestablished . . . was carefully reached after a deliberate and painstaking evaluation of thousands of pages of documents, after weighing the testimony of witnesses, after examining maps and photographs, and then by placing this giant mosaic of law and fact into historical and practical perspective. In so doing, the [district] court was sensitive and obedient to all relevant guidance of the decisions of the U.S. Supreme Court. . . .

Opening Brief of State of Utah, on appeal to the Tenth Circuit in *Ute Indian Tribe v. Utah*, pp. 2-3.

Utah further stated:

> While Utah did not receive all that it requested in the lower court, it does feel that it had a fair trial, and that it is virtually impossible for any party to

> present a persuasive argument to show that the district court committed reversible error. *Id.*

Before the Court today, Utah seeks a ruling that, in fact, the boundaries of the Uintah Valley Reservation were disestablished – a ruling contrary to the Utah federal court ruling which it supported twelve years ago. Utah's conflicting positions gives rise to judicial estoppel, a bar employed when a litigant is "playing fast and loose with the courts" and when "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3rd Cir. 1953). Indeed, the Court acknowledged this doctrine nearly 100 years ago:

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Davis v. Wakelee, 156 U.S. 680, 689 (1895); *see also Steagald v. United States*, 451 U.S. 204, 209 (1981); *In re Cassidy*, 892 F.2d 637 (7th Cir. 1990); *Teledyne Industries, Inc. v. NLRB*, 911 F.2d 1214 (6th Cir. 1990); *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83 (1st Cir. 1990); and *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3rd Cir. 1988).

Having voluntarily intervened in the federal court proceedings 17 years ago, *Ute Tribe District Ct.*, 521 F.Supp. at 1075, n. 1, and having embraced the decision of its federal courts preserving the boundary of the Uintah Valley Reservation, the State of Utah is playing fast and loose with this Court. It should be estopped from doing so.

B. Because Collateral Estoppel Was Pressed and Passed Below, it Should Be Ruled Upon.

Collateral estoppel was both pressed and passed upon below. *United States v. Williams*, ___ U.S. ___, 112 S.Ct. 1735, 1738 (1992). Indeed, it was pressed by the State of

Utah, which asked its State Supreme Court to reverse a decision of the Utah Court of Appeals, because the State Court of Appeals had held the State of Utah collaterally estopped by the findings in *Ute Tribe District Ct.* and *Ute Tribe en banc. State v. Hagen*, 802 P.2d 745 (Utah App. 1990) *rev'd* 191 Utah Adv.Rep. 26 (J.A. 15) (hereinafter, "*Hagen*").[1] Moreover, the decision of the Utah Supreme Court in *Utah v. Perank* (J.A. 18) (hereinafter, "*Perank*"), which applied its decision to Robert Hagen, in fact, adverted to collateral estoppel, even though collateral estoppel had not been raised in the *Perank* appeal, only in the *Hagen* appeal. *Perank* (J.A. p. 21, n. 3)

The Court has emphasized that it is essential that a matter before it be both "pressed and passed" by the courts below so as to permit the Court to "have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee v. City of Escondido, California*, ___ U.S. ___, 112 S.Ct. 1522, 1534 (1992). Because collateral estoppel has been fully briefed and was considered by the courts below, the Court should rule on its applicability.

C. Utah's Stipulation Makes *Ute Indian Tribe en banc* and *Hagen* One and the same Case.

The State of Utah, by stipulation (*see* Brief of Respondent in Support of Petition for Writ of Certiorari at 164a), incorporated and made a part of the record "the designated record in *Ute Indian Tribe v. State of Utah, et al.*, 773 P.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986) . . . together with all appellate briefs." That stipulation, voluntarily entered into by the State of Utah, permits the Court to address collateral estoppel. The Courts of Appeals for the fifth, second and eighth circuits have, *sua sponte*,

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[1] The specific question asked of the Utah Supreme Court by the State of Utah was: "should [certiorari] be granted to review the court of appeals' decision that this Court cannot decide *Perank* in a manner contrary to *Ute Indian Tribe* and that Myton is therefore within the reservation?"

reached the res judicata issue under comparable circumstances:

> We are cognizant that *res judicata*, as such, has not been specially pled. . . . [H]owever, where all the relevant facts are contained in the record before us and all are uncontroverted, we may not ignore their legal effect, nor may we decline to consider the application of controlling rules of law to dispositive facts, simply because neither party has seen fit to invite our attention to the issue by technically correct and exact pleadings. We do so *sua sponte*.

American Furniture Co. v. International Accommodations Supply, 721 F.2d 478, 482 (5th Cir. 1981)[2].

Indeed, this Court has acknowledged this prerogative, at least where the same court has considered the issue presented. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting). This power should be exercised to protect the federal rights of criminal defendant Robert Hagen.

D. Collateral Estoppel is Embraced Within the Question Presented.

Sup. Ct. R. 14.1(a) provides that only the questions set forth in the petition or fairly included therein will be considered by the Court. The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. *Yee*, 112 S.Ct. at 1532. Mr. Hagen's defense of collateral estoppel arising out of the *Ute Tribe en banc* decision, is fairly included in the question presented to the Court, for the following reasons:

First, the question presented, "whether the Uintah and Ouray Indian Reservation was diminished by the act of May 27, 1902, 32 Stat. 245, so as to confer criminal jurisdiction over Indians within the unallotted area of the Reservation

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[2] See also *Hedger Transp. Corp. v. Bushey & Sons, Inc.*, 186 F.2d 236 (2nd Cir. 1951) and *Wilson v. United States*, 166 F.2d 527 (8th Cir. 1948). The Courts of Appeal have considered res judicata sua sponte because of the important public interest underlying res judicata.

upon the State of Utah," focuses on the power of the State of Utah to criminally prosecute Indians. That is, because the question presented emerges from a criminal prosecution and not a declaratory judgment action, the power of the Utah courts over Robert Hagen is the question before the Court and that power is defined either by application of collateral estoppel or by the court's disestablishment precedent. The inquiry into the 1902-1905 opening of the Uintah Valley Reservation is necessary only if the State of Utah is not bound by *Ute Tribe en banc*. That the parties considered collateral estoppel to be fairly included is confirmed by the parties entering into a stipulation, discussed above, which expressly and formally incorporated into the instant record before the Court, the entire record in *Ute Tribe en banc*.

Second, Petitioner in his Petition of Certiorari to the Court set forth the unequivocal basis of collateral estoppel, described below, and the State of Utah, in its response, never contested this description.

> The issue decided by the Supreme Court of the State of Utah, whether the Uintah and Ouray Reservation has been diminished, is identical with the issue decided by the Tenth Circuit (*en banc*) in *Ute Tribe*. Both the Ute Indian Tribe and the State of Utah had a full and fair opportunity to litigate the issue which was adjudicated on the merits by the Tenth Circuit.

Petition for Writ of Certiorari of Petitioner, p. 7.

In his Supplemental Brief, Petitioner, Hagen, through his Utah counsel observed, without case citation, that the question of collateral estoppel as it may bind the State of Utah appears to raise a separate question from the diminishment question presented. Supplemental Brief of Petitioner, pp. 1-2.[3] At the same time, however, Petitioner told the Court that

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[3] The State of Utah claims that this reply by Mr. Hagen, made in response to the efforts of the Ute Indian Tribe, filing a Brief Amicus Curiae, to reassert the primacy of the federal courts in Utah through the initiation of an anti-injunction proceeding in *Ute Tribe District Ct.*, (Brief of *Amicus Curiae* Ute Indian Tribe in Opposition to Granting the Writ of Certiorari), constitutes a waiver of the question

both he and *Perank* were riding piggyback on *Ute Tribe en banc*: "Furthermore, the Supreme Court of the State of Utah had the benefit of the entire record considered by the Tenth Circuit, including copies of all Briefs submitted by the parties which are filed with the Tenth Circuit." Supp. Brief of Petitioner, p. 3.

Whether or not a question, like the applicability of collateral estoppel, is fairly included within a question presented, turns primarily on (1) the extent to which the subsidiary issue was considered below and (2) the extent to which the subsidiary issue is closely connected. *See*, e.g., *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, ___ U.S. ___, 111 S.Ct. 905 (1991) (The impact of tribal sovereign immunity on Oklahoma's collection of past state taxes – the question presented – embraces Oklahoma's efforts to have the Tribe prospectively collect such taxes.); *Braniff Airways, Inc. v. Nebraska State Board of Equalization*, 347 U.S. 590 (1954) (Whether the taxpayer's airplanes acquired taxable status under the Commerce Clause – the question presented – embraced taxpayers' efforts to resist taxable status under the Due Process Clause); and *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) (Whether a partial assumption of state jurisdiction over an Indian Reservation is authorized under Public Law 280 and, if so, does it violate the Equal Protection Clause – the question presented – permitted the Tribe also to challenge the partial

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presented of the impact of collateral estoppel. But as Hagen explained, having already been sentenced to the Utah State Penitentiary, he could not rely on the laudable efforts of the Ute Tribe to successfully cut off his prison sentence through reinstating the federal court proceeding. Hagen had no choice but to also pursue at the same time, relief in this Court. Moreover, to the extent that Hagen failed to expressly pursue collateral estoppel relief, it does not prevent the Court from concluding that collateral estoppel is subsidiary to the question presented. In a different criminal setting the Utah Supreme Court noted, "[u]nder such circumstances, failure to consider defendant's assigned error merely because he was tardy or inartful in raising the issue previously strikes us as manifestly unjust. We believe at the very least, such action would deny defendant due process, as guaranteed under our federal and state constitutions." *State v. Haston*, 846 P.2d 1276, 1277 (Utah 1993).

assumption on the basis that Washington State had not repealed its state constitutional disclaimer). Like *Potawatomi*, *Braniff*, and *Confederated Bands*, collateral estoppel here is "implicit" in the question presented – the scope of Utah's criminal court jurisdiction over Indians. It should therefore, be considered by the Court.

E. The Court Should Reach the Collateral Estoppel, Due Process, and Effective Assistance of Counsel Issues as Plain Error.

Under exceptional circumstances, especially in criminal cases, the Court can reach errors to which no exception has been made. *United States v. Frady*, 456 U.S. 152, 163, n. 13 (1982). The Court will do so where the errors are obvious or if they "otherwise seriously effect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936). Errors must be both obvious and substantial. *United States v. Brown*, 555 F.2d 407, 420 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). Moreover, plain error may be applied less rigidly when reviewing a potential constitutional error. *United States v. Torres*, 901 F.2d 205, 228 (2nd Cir. 1990); *United States v. Jefferson*, 925 F.2d 1242, 1254 (10th Cir. 1991). Mr. Hagen has not only urged the Court to reinstate the proper role of the federal courts in Utah through a ruling on collateral estoppel, but also, Mr. Hagen has set forth significant claims that the coupling of his appeal and that of Mr. Perank by the Utah Supreme Court violated both his Fourteenth Amendment due process rights and his Sixth Amendment rights to assistance of counsel. See Brief of Petitioner, pp. 25-29.[4]

As explained below, the Court should utilize plain error to reach Hagen's collateral estoppel and Constitutional claims. First, the Court has acknowledged that the consolidation or severing of criminal defendants may be undertaken in

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[4] The Court has acknowledged its right, *ab initio*, to review federal constitutional claims arising for the first time out of the conduct of the state court of last resort. *Grannis v. Ordean*, 234 U.S. 385, 392 (1914).

order to "promote economy and efficiency" but only so long as those objectives can be achieved "without substantial prejudice to the right of the defendants to a fair trial". *Zafiro v. United States,* ___ U.S. ___, 113 S.Ct. 933, 938 (1993). Moreover, the Court has intervened to ensure that states do not invoke state procedures which deprive defendants of federal constitutional rights. *Rogers v. Richmond,* 365 U.S. 534, 547-548 (1961). *See also Boles v. Stevenson,* 379 U.S. 43, 45-46 (1964). In *Evitts v. Lucey,* 469 U.S. 387, 401 (1985) the Court stated: "In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *See also Gomillion v. Lightfoot,* 364 U.S. 339, 347 (1960).

To conclude, the submerging of Hagen's appeal (and the concomitant disappearance of his collateral estoppel defense) in *Perank* is an example of state judicial procedures gone awry. Indeed, Utah Supreme Court Justice Zimmerman, in dissent, so acknowledged.[5] Accordingly, the Court should find plain error and reach Hagen's collateral estoppel, due process, and right to effective assistance of counsel defenses.

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[5] "I find almost incredible the refusal of the majority of this court to accord comity to a federal court's decision in an area in which the federal government has preeminent authority and a unique trust responsibility. A majority of this court has given the State of Utah what it has desperately sought for six years – a second shot at persuading the United States Supreme Court to reject the Tenth Circuit's ruling and to give Utah control over a large part of the original reservation." (J.A. p. 76). Also, Justice Zimmerman raised concerns about the fundamental fairness and due process of the state court proceedings: "I would object to the State's opportunistic misuse of *Perank's* petty criminal prosecution to readjudicate a settled issue under any circumstance, but the unequal and inadequate briefing of the boundary issue in this case makes it a particularly poor vehicle for bringing us into a direct confrontation with the Tenth Circuit. *Perank's* brief contained a total of six pages of argument, the bulk of it concerning his assertion that he is an Indian. He allotted fewer than two pages to jurisdictional and boundary issues. In contrast, the State filed a fifty-page brief, devoting the majority of it to an attack of the Tenth Circuit's decision in *Ute Indian Tribe* and to a reargument of the boundary issue." (J.A. at 77) (emphasis supplied).

F. *Stoll v. Gottlieb* Directs the Court to Rule Upon Collateral Estoppel.

Yet a final reason why it is essential that the Court examine the issue of collateral estoppel arises from the following rule of full faith and credit which this Court has fashioned from the Full Faith and Credit Clause, the Supremacy Clause, Article III, and the Congressional Full Faith and Credit Act, 28 U.S.C. § 1738:

> [T]he judgments and decrees of the Federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances. But where the judgment or decree of the Federal Court determines a right under a federal statute, that decision is 'final until reversed in an appellate court, or modified or set aside in the court of its rendition.'

Stoll v. Gottlieb, 305 U.S. 165, 170 (1938) (*quoting Deposit Bank of Frankfort v. Board of Councilmen,* 191 U.S. 499, 520 (1903).

As explained in our *Opening Brief,* pp. 12-24, the Utah Supreme Court in fact failed to honor the full faith and credit mandate set out, *supra,* in *Stoll.*[6] That is, the Utah Supreme Court, in this appeal, intentionally and deliberately ignored the supremacy of federal-court-decreed federal law and substituted Utah-created federal law. This, Utah cannot lawfully do. We therefore, request the Court to set Utah straight.

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[6] In other circumstances, Utah has honored the doctrine. *Copper State Thrift and Loan v. Bruno,* 735 P.2d 387 (Utah App. 1987). Moreover, the Court has recently reaffirmed *Stoll: Maine v. Taylor,* 477 U.S. 131, 137 (1986) and *University of Tennessee v. Elliott,* 478 U.S. 788, 794 (1986). *See also Delaware Valley Citizens Council v. Commonwealth of Pennsylvania,* 755 F.2d 38 (3rd Cir. 1985) ("What was attempted in the state courts and the ostensible relief granted by the state's highest court, of course, flies in the face of settled law and the doctrine of res judicata." *Id.* at 42)

II.

THE COURT'S TEST FOR RESERVATION DISESTABLISHMENT – HONORED IN UTE TRIBE *EN BANC* IS ABUSED BY THE UTAH SUPREME COURT.

Utah and its Amici request the Court to rewrite the law of Reservation disestablishment because, as we show below, they are unable to overcome the Court's promise to the Indians. "[d]iminishment . . . will not be lightly inferred. Our analysis of surplus land Acts requires that Congress clearly evince an 'intent to change . . . boundaries' before diminishment will be found." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977)).

A. Utah Wants the Statutory Test Thrown Out.

In order for Utah to prevail, it must convince the Court to reverse *Solem* and to conclude (contrary to *Solem*) that the placing of Reservation lands in the public domain satisfies as a matter of law the required test of statutory disestablishment: "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *Solem*, 465 U.S. at 470. In *Solem*, the Court acknowledged that while the phrase "in the public domain" exhibits some evidence of diminishment, it is not conclusive, largely because it is inherently ambiguous as to whether placing lands in the public domain refers to the public title to the lands or to their location outside of an Indian Reservation. *Solem*, 465 U.S. at 475.[7]

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[7] Utah cites to no decisions of this Court in support of its proposition that restoration of unallotted lands to the "public domain" effects a disestablishment of those lands from the affected Reservation. *See* Resp. Br. at 17-23. At the same time, *Amici* League of Cities, *et al.*, p. 20, n. 12 obviously briefing issues of first impression to them, string cite to a number of lower federal court decisions which, *Amici* erroneously assert, "followed this Court's lead in concluding that language ordering the return or restoration of land to the public domain has the effect of diminishing a reservation." Brief of *Amici*, League of Cities, *et al.*, p. 20, n. 12. In fact, in only one of the cases cited by these *Amici* did the relevant statute include the term "public domain". *See United States ex rel. Condon v. Erickson*, 478 F.2d 684, 687 (8th Cir. 1973), *aff'd sub nom, Solem v. Bartlett*, 465 U.S. 463 (1984) (authorizing the affected Indians to use timber on unallotted lands "only so long as the lands remain part of the public domain"). The Eighth Circuit concluded, as did this Court when asked to review the same statute nine years later, that such language was not sufficient to evince a Congressional intent to diminish the Cheyenne River Reservation. *See Condon*, 478 F.2d at 685-86; *Solem*, 465 U.S. at 475.

In contrast to the inherent ambiguity embodied in "public domain", the Court has identified congressional actions which evidence a present and total surrender of all Indian Reservation interests. In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Act of March 3, 1891, 26 Stat. 1035 ratified an 1889 cession agreement where the Indians agreed to "cede, sell, relinquish, and convey to the United States all the unallotted land within the reservation. . . . " *DeCoteau*, 420 U.S. at 437 (quoting *Commissioner's Report* to Sec. of Interior, S. Exec. Doc. No. 66). Moreover, the ratifying act created a sum certain of $2,203,000 to pay the Indians for the ceded land. *DeCoteau*, 420 U.S. at 441. Then, in *Rosebud*, 430 U.S. at 591, n. 8, the Court concluded that the Act of May 30, 1910, 36 Stat. 448, effected a disestablishment, for it, like the 1891 act in *DeCoteau*, ratified a cession agreement where the Indians agreed to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota."

A review of the 1902-1905 Acts at issue here shows that unlike *Rosebud* and *DeCoteau*, the opening of Ute lands was made with no reference to an agreed cession of Reservation boundaries. Nor do the 1902-1905 Ute Acts describe the Reservation as "vacated," "discontinued" or "abolished" – language which Congress has used elsewhere to terminate a Reservation. *Mattz v. Arnett*, 412 U.S. 481, 504, n. 22 (1973). While the 1902 Act provided that the unallotted lands "within said Reservation" shall be restored to the public domain (the

only language to which Utah can point to show extinguishment of Reservation boundaries), one month later in the joint resolution of June 19, 1902, 32 Stat. 744, Congress described the opening of the unallotted lands as "lands . . . open to disposition under any public land law . . . " (J.A. p. 162). Then, in the Act of March 3, 1903, 32 Stat. at 997, Congress referred to the opening of the unallotted lands "to public entry on said Uintah Reservation". (J.A. p. 164). Finally, in both the Act of April 21, 1904, 33 Stat. at 207 and the actual opening Act of March 3, 1905, 33 Stat. at 1069, Congress described the opening of the unallotted lands to "public entry, "and in 33 Stat. at 1069, provided entry" . . . under the general provisions of the homestead and townsite laws . . . " (J.A. pp. 166-167). Under the Court's precedent, these words of Reservation-opening do not evidence a present and total surrender of all Indian interests.[8]

B. Utah wants the "Surrounding Events" Test Rewritten.

In the absence of explicit statutory language showing a present and total surrender of all tribal interests, the Court has looked to surrounding events – "particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress," *Solem*, 465 U.S. at 471, to see whether such events "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the

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[8] *Compare Solem*, 465 U.S. 463 (statute authorized the Secretary to "sell and dispose" of the unallotted lands opened, but did not disestablish the affected lands); *Mattz*, 412 U.S. 481 (a declaration that unallotted lands were "subject to settlement, entry and purchase" under the homestead laws opened, but did not disestablish, the affected lands); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962) (a declaration that unallotted lands "shall be open to settlement and entry under the homestead laws" opened, but did not disestablish, the affected lands) with *Rosebud*, 430 U.S. 584 (1977) (a statute based on agreement whereby Indians consented to "cede, surrender, grant and convey to the United States all their claim, right, title and interest" in a defined portion of the Reservation disestablished those lands); *DeCoteau*, 420 U.S. 425 (a ratification of agreement whereby Indians consented to "cede, sell, relinquish and convey" unallotted lands disestablished those lands).

proposed legislation . . . " *Id.* in *Rosebud*, the court relied in part upon the findings of Inspector McLaughlin who explained to the Sioux Indians there that its cession agreement "will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." *Rosebud*, 430 U.S. at 591-592.

That same Inspector McLaughlin represented the United States in the opening of the Uintah Valley Reservation during 1902-1905. Because there was no cession agreement entered into between the United States and the Ute Tribe as there was in *Rosebud*, McLaughlin's task was limited to explaining to individual Indians the inevitability of Congress' plan to open the Reservation.[9] Never once during the days of meeting with the Ute Indians did McLaughlin tell the Indians that the shape or size or location of their Reservation would be changed. To the contrary, the talk was limited to opening their present Reservation to nonIndians. Indeed, Officer McLaughlin used the word "opening" 24 times and the Ute Indians, in response, used the word "opening" 14 times. *See* minutes of meetings with Ute Indians, Brief, Duchesne County, pp. 333a-407a. That the retention by the Utes of their land holdings was the subject of negotiations, as opposed to the dismantling of the Reservation, is demonstrated by the following statement of Inspector McLaughlin:

> My friends, if the entire Reservation was of any benefit to you, and you could make proper use of it all, you would not be disturbed in its possession. But there is more land here than you need. Congress has provided for the opening of the surplus land in the way I have explained.

Id. at 390a.

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[9] That is, because the United Stated did not seek or obtain a formal cession agreement with the Ute Indian Tribe as a sovereign entity, but rather only sought (and did not obtain) the consent of individual Indians to Congress' opening plan, there exists here no United States "transaction . . . negotiated with the Tribes", but rather less formal evidence of whether the parties saw the events as opening Reservation lands or, in contrast, eliminating a significant and identifiable block of the Reservation.

McLaughlin emphasized that the opening would not take away what they have but only improve the way of life for the Indians:

> My friends, I want to tell you people that your Agency will remain just as it is. You will have an Agent provided who will look after your interests just as at the present time, and any change that is going to take place will be for the better, as you will have individual allotments.

Id. at 380a.

In response to the fear of the Indians that the White man would come to steal the Indians' allotments, McLaughlin assured them that each of them would have a boundary to his individual holdings, even though with the opening there would be no outside boundary to the Reservation. *Id.* at p. 368a. Utah and its Amici seize upon this one reference to an outside boundary as establishing a "widely held contemporaneous understanding that the effected Reservation would shrink." But neither Utah nor its Amici read on to see that the reference to individual boundaries replacing the outside boundary was not, as in *Rosebud,* to describe the new shape, size, and location of the Reservation. Rather, the Utes were assured that while nonIndians would be free to settle on the open lands, the Indians' control of the Reservation would not be diminished. Only a few sentences later McLaughlin said:

> You fear that you are going to be confined to the tract of land allotted. That is not so. . . . Your Agency will be continued just the same as now; the Agent will have *full jurisdiction just the same as now.* . . . *Id.* (emphasis supplied)

Therefore, in contrast to *Rosebud* and *DeCoteau* there is no clear evidence here of a reduced Reservation size, shape, or location.

C. Utah Corrupts the Court's Use of Baseline Intent.

Perhaps the most radical request of Utah and of its Amici is to convert the "baseline intent" necessary to effect a termination of boundaries from an intent focused solely on the

Reservation opening at issue to *any* cession appearing in *any* land transaction in the long history of a given Reservation. In *Rosebud,* the Court found that a 1901 cession agreement, quoted above, constituted an unambiguous extinguishment of all Indian interests and that a series of statutes ending with the Act of May 30, 1910 implemented that 1901 agreement. Not having in their pocket a cession agreement in Utah nor indeed consent by a majority of the Ute Indians[10], Utah and its Amici fabricate a new "theory" of baseline intent. They claim to find the required disestablishment intent in the Act of May 24, 1888, 25 Stat. 157, which opened a small sliver of land for mineral entry, the so-called Gilsonite Strip.

They take the Indians' understanding with respect to that isolated 1888 event and spread it to hundreds of thousands of acres opened in 1905 to nonIndian homesteaders, farmers and townsites. Their corruption of baseline intent will not work. First, the Gilsonite Strip involved a small portion of mineral lands only; second, it was consented to by a three-fourths vote of the Tribal membership in 1888, *Ute Tribe District Ct.,* 521 F.Supp. at 1099; third, with Tribal consent, Congress did not specify that the lands be opened, but rather that a portion of the Reservation itself, within the "following boundary," be "declared to be public lands of the United States and restored to the public domain". 25 Stat. at 157. Finally, as in the case of *Rosebud* and *DeCoteau,* Congress paid a sum certain for the Gilsonite Strip. Joint Resolution of June 19, 1902, 32 Stat. 744.

The condition precedent of a baseline intent to disestablish relating directly to the disputed homestead opening found in *Rosebud* simply does not exist here. In *Rosebud,* 430 U.S. at 605-606, all parties agreed that the cession agreement effected a complete extinguishment, and that the substance and intent of the ratifying 1904, 1907, and 1910 statutes all dealt with the same opening. Here, no party has ever suggested (until Utah and its Amici) that the 1888 plan of the

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[10] The State of Utah concedes that at the opening of the Unitah Valley Reservation, Ute Indian consent "was wholly lacking." *Ute Tribe District Ct.,* 521 F.Supp. at 1118.

United States and the Ute Indians, with respect to the Gilsonite Strip, was carried forward lock, stock and barrel, 14 years later to the opening of thousands of Uintah Valley acres for homestead and townsite purposes.[11] The Court should reject Utah's historically unsupported theories.

III.

NEITHER PRESENT DEMOGRAPHICS NOR CONTEMPORARY FEDERAL POLICIES FAVOR DISESTABLISHMENT

This appeal will determine whether the State of Utah criminal justice system (as opposed to federal and tribal courts) will prosecute Indians committing crimes on the 27 percent of the Uintah Valley Reservation opened in 1905 and presently owned in fee by nonIndians. Regardless of the outcome of this case, federal and Tribal courts will continue to prosecute Indians on 73 percent of the Uintah Valley Reservation lands retained by the Ute Indian Tribe for its members. Resp. Brief at 9-10. Moreover, because the instant case affects the power of Utah's courts only over Indians, the presence of a nonIndian population on the fee lands larger than the Indian population is simply irrelevant. The Court has frequently observed that "the population on nonIndians on reservations generally is greater than the population of all Indians, both members and non-members . . . " *Duro v. Reina,*

[11] The point we make here – that the unquestioned cession of a Reservation boundary in the Gilsonite Strip in 1888 has nothing to do with the opening of Reservation lands in 1902-1905 is further demonstrated by the Act of April 4, 1910, 36 Stat. 269, terminating certain reclamation lands on the Ute Reservation and the Act of June 15, 1880, 21 Stat. 199, extinguishing the Ute Indians' rights to their Colorado Reservation. In the Act of April 4, 1910, Congress provided that "all right, title and interest of the Indians in the same [reclamation] lands are hereby extinguished. . . . " 36 Stat. at 285, and in the Act of June 15, 1880, Congress ratified an agreement with the Ute Indians where the Indians agreed to "cede to the United States all their territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement." 21 Stat. at 201. These Acts show that Congress knew how to effect a complete surrender of Ute Indian interests and chose not to do so when opening the Uintah Valley Reservation.

495 U.S. 676, 695 (1990). As a result, the Court has made clear that Indian tribes may exert civil or regulatory jurisdiction only over those nonIndians who enter consensual relationships with a tribe or tribal members or whose "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States,* 450 U.S. 544, 566 (1981); *South Dakota v. Bourland,* ___ U.S. ___, 113 S.Ct. 2309, 2320 (1993).[12]

Moreover, there is no real conflict between basic democratic principles and allowing such tribal authority over those non-members who enter the tribal territory. *See,* e.g., Joseph W. Singer, *Sovereignty and Property,* 86 N.W. U. L.Rev. 1, 33-34 (1991). Surely, the nonIndians who took non-allotted lands at Ute and elsewhere under Dawes Act policies, Act of February 8, 1887, 24 Stat. 388, were not ignorant of the tribal presence. The Dawes Act provisions do not "even suggest that Congress intended thereby to terminate" reservations which were opened to nonIndian settlement. *Mattz,* 412 U.S. 481, 497 (1973). A contemporaneous account observed that "[i]t [the Dawes Act] leaves the whole reservation system untouched." Thayer, *The Dawes Bill and the Indians,* 61 Atlantic Monthly 316, 321 (March, 1888).[13] There was only a rather common expectation that "within a generation at most

[12] Moreover, the Court long ago ruled that the Tribes cannot assert criminal jurisdiction over nonIndians, *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978)

[13] This Court's precedents and the contemporaneous accounts of the Dawes Act lay to rest the astonishing thesis of amicus curiae Uintah County, Utah that the Solicitor General has been actively and deliberately attempting to mislead the Court and that the Court has been consistently duped by the Solicitor General's "revisionism." There is simply no rational support for the notion that Solicitor General Bork (who submitted briefs for the United States as amicus curiae in *DeCoteau* and *Rosebud*), Solicitor General Griswold (who submitted a brief for the United States in *Mattz*), and Solicitor General Rankin (who submitted a brief for the United States in *Seymour*) have engaged in such a calculated pattern of deception.

. . . the reservation system would cease to exist." *Solem*, 465 U.S. at 468.[14]

Missing from the fears of Utah and its Amici that tribal power will threaten the nonIndian majority living on 27 percent of the Uintah Valley Reservation lands is *any* concern over the consent of the Indian governed. Contrary to the arguments of Utah and its Amici, the lack of tribal consent to the opening of the Reservation, as is the case here, is a factor to which this Court gives serious consideration. *See, e.g., DeCoteau*, 420 U.S. at 448. Indeed, the rules of statutory construction which require that evidence of Congressional intent to terminate a Reservation be "substantial and compelling" before diminishment is found, *Solem*, 465 U.S. at 472, are based on the fundamental disharmony of plenary Congressional control over people like the Utes who have no effective voice in the government and, indeed, could not vote at the time that Congress was considering opening their Reservation. *See* Richard B. Collins, *Indian Consent to American Government*, 31 Ariz. L. Rev. 365, 379 (1989). In this case, the Utes resolutely refused to consent to any diminution of their reservation, established by Congress in 1864 "for the permanent settlement and exclusive occupation of the Indians"[15] – despite the patently misleading entreaties of Inspector McLaughlin.[16] The Utes, too, had justifiable expectations: that the United States would treat them honorably and

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[14] *Accord Sovereignty and Property, supra*, at 34 ("at the time of the Dawes Act, nonIndian purchasers should have been on notice that they were buying property in Indian country which might be subject to regulation by the Indian nation.") (footnote omitted).

[15] Section 2 of the Act of May 5, 1864, ch. 77, 13 Stat. 64. *Ute Tribe en banc*, 773 F.2d at 1088.

[16] McLaughlin began his "negotiations" by stating that *Lone Wolf v. Hitchcock*, 187 U.S. 553, (1903), held "that Indians have no right to any part of their Reservations except what they may require for allotments in severalty or can make proper use of." Brief for Duchesne County at 335a. *See id.* at 341a. Of course, this court said no such thing. Indeed, for years after *Lone Wolf*, Congress continued to seek the consent of the affected Indians before enacting a statute that reduced the geographic scope of a Reservation. *See* Act of June 30, 1913, ch. 4, 38 Stat. 77, 81-83 (ratifying May 10, 1911, cession agreement with Wiminuche Bank of Southern Ute Indians); Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1078 (ratifying May 28, 1904, cession agreement with Port Madison Tribe); Act of March 3, 1905, Ch. 1452, 33 Stat. 1016 (ratifying April 21, 1904, cession agreement with Shoshone and Arapaho Tribes) [reproduced in Brief of Fremont County, Wyoming, et al.] *See also* 42 Cong. Rec. 7003, 7005 (May 26, 1908) (in debate on S. 1385, later enacted as the Act of May 29, 1908, 35 Stat. 460 [authorizing the Secretary of Interior to sell and dispose of the unallotted lands of the Cheyenne River and Standing Rock Sioux Reservations], Mr. Sherman remarking that an agent had been sent to "ascertain whether it was the desire of the Indians that these lands be opened"). In fact, it was not until after *Lone Wolf*, that Congress specifically directed the Secretary of the Interior to dispatch an Indian inspector to attempt to secure the Utes' consent to allotment of the Uintah Valley Reservation. Consistent with the historical evidence, this Court has only found that Congress carried through with an intent to disestablish lands from a Reservation when the affected Indians consented to such disestablishment. *See Rosebud*, 430 U.S. 584; *DeCoteau*, 420 U.S. 425; *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). When there is no evidence that the Indians consented to disestablishment, this Court has found that no disestablishment occurred. *See Solem*, 465 U.S. 463; *Mattz*, 412 U.S. 481; *Seymour*, 368 U.S. 351.

keep its word. *See Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word.").

To conclude, if this court countenances Utah's volte-face under these circumstances – its "opportunistic misuse of [a] petty criminal prosecution to readjudicate a settled issue . . . for the sole purpose of creating a conflict with the federal courts to force Supreme Court review"[17] – this Court will be working overtime on Reservation diminishment cases, long ago settled (or presumably so) by the federal courts of appeal. Amicus curiae Fremont County, Wyoming will immediately seek a more sympathetic state court forum to relitigate an eleven year old decision which this Court determined was not cert-worthy, *Confederated Salish & Kootenae Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977 (1982). Amicus curiae Duchesne County – which represented to the Tenth Circuit that its decision would "define, once and for all, the governmental authority of the various parties in the area involved (absent further congressional

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[17] *Perank*, (J.A. 76-81) (Zimmerman, J., dissenting) (J.A. 76-81).

involvement)"[18] – will proceed with a similar strategy to achieve through the Utah Supreme Court and then through this Court a reduction of the Uncompaghre Reservation contrary to *Ute Tribe en banc*. Amici Curiae South Dakota, *et al.*, will not be far behind. This flood of litigation will be the inevitable result of affirmance of the Utah Supreme Court here.

For all of the above reasons, the decision of the Utah Supreme Court should be reversed and the conviction of Robert Hagen dismissed with prejudice.

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[18] Reply Brief of Appellee/Cross-Appellant Counties and Cities, at 1, Nos. 81-1827 & 81-1901 (10th Cir.)